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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-

CBS INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (KELLEHER, D.J.), UNITED STATES OF AMERICA and NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	3
Constitutional provision and statutes involved	4
Statement of the case	4
1. The Complaint	4
2. The Proposed Decree and Accompanying Competitive Impact Statement	5
3. Opposition to the Decree	7
4. The District Court's Entry of the Decree Without Permitting Intervention or an Evidentiary Hearing	8
5. CBS's Petition for Mandamus	9
6. The District Court's Belated Explanation of Its "Public Interest" Finding	10
7. The Court of Appeals' Denial of the Petition for Mandamus	11
Reasons for granting the writ	11
1. The *NBC* Decree Is Designed To Suppress Competition and Drive Up Prices	13
2. The District Court's View That a Decree Consistent with the Complaint and the Objectives of the Antitrust Division Ipso Facto Satisfies the Public Interest Standard of the APPA Is Erroneous	16
3. The Refusal of the District Court To Permit the Adversary, Evidentiary Hearing Authorized by 15 U.S.C. § 16(f)(1) and (3) Was a Gross Abuse of Discretion in the Circumstances of this Case	18

Page

4. The Erroneous Standard Adopted by the District Court Substantially Prejudiced a Proper Assessment of the "Public Interest" as Declared in the Communications Act and the First Amendment 21

5. Mandamus Sought by Adversely Affected Nonparties Is the Only Effective Vehicle for Appellate Review of APPA Determinations 23

Conclusion 26

CITATIONS

CASES:

Bates v. *State Bar*, 433 U.S. 350 (1977) 23

Bendix Corp., 77 F.T.C. 731 (1970), *rev'd on other grounds*, 450 F.2d 534 (6th Cir. 1971) 14

Bigelow v. *Virginia*, 421 U.S. 809 (1975) 23

Blackledge v. *Perry*, 417 U.S. 21 (1974) 4

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) 14

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 11, 14

Calnetics Corp. v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976) 11, 14

CBS Inc. v. *Young*, 522 F.2d 234 (6th Cir. 1975) 24

Ford Motor Co. v. *United States*, 405 U.S. 562 (1972) 14

FTC v. *Procter & Gamble Co.*, 386 U.S. 568 (1967) 14

Kerr v. *United States District Court*, 426 U.S. 394 (1976) 24

National Broadcasting Co. v. *United States*, 421 U.S. 940 (1975) 5

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 23

Page

Northern Pac. Ry. v. *United States*, 356 U.S. 1 (1958) 15

Oyler v. *Boles*, 368 U.S. 448 (1962) 4

Schlagenhauf v. *Holder*, 379 U.S. 104 (1964) 23

Swift & Co. v. *United States*, 276 U.S. 311 (1928) 23

United States v. *CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970) 20

United States v. *DeMarco*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977) 4

United States v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973) 14

United States v. *Fruehauf*, 365 U.S. 146 (1961) .. 20

United States v. *Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975) 12, 17, 18, 20

United States v. *National Broadcasting Co.*, 1974-1 Trade Cas. ¶ 74,885 (C.D. Cal. 1973) 21

United States v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) 14

United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963) 14, 16

United States v. *Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd*, 418 U.S. 906 (1974) 14

United States v. *Sherman*, 581 F.2d 1358 (9th Cir. 1978) 24

United States v. *Steele*, 461 F.2d 1148 (9th Cir. 1972) 5

United States v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) 16

Virginia Pharmacy Board v. *Virginia Consumer Council*, 425 U.S. 748 (1976) 23

Will v. *United States*, 389 U.S. 90 (1967) 24

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 4

Page

STATUTES AND RULES:

United States Constitution, Amendment I 4, 9, 21, 22, 23

15 U.S.C. §§ 1 and 2 ..... *passim*

15 U.S.C. § 16 ..... *passim*

28 U.S.C. § 1254(1) 2

28 U.S.C. §§ 1291, 1292 24

28 U.S.C. § 1651 9

28 U.S.C. § 2101(c) 2

47 U.S.C. §§ 151 *et seq.* 21, 22

U.S. Sup. Ct. R. 22 and 34 2

Fed. R. App. P. 21 9

Fed. R. Civ. P. 24 ..... 3, 24, 25

OTHER AUTHORITIES:

The Antitrust Procedures and Penalties Act: Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 93d Cong., 1st Sess. (1973) 17

Consent Decree Bills: Hearing Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 93d Cong., 1st Sess. (1973) 17

In the Matter of Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest, Notice of Inquiry, F.C.C. Docket No. 21049, 42 Fed. Reg. 4992 (1977) 21

Note, *Construction and Modification of Antitrust Consent Decrees: New Approaches After the Antitrust Procedures and Penalties Act of 1974*, 77 COLUM. L. REV. 296 (1977) 17

H.R. Rep. No. 1463, 93d Cong., 2d Sess. (1974) 12, 13, 17

S. Rep. No. 298, 93d Cong., 1st Sess. (1973) 12, 13, 17, 19

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner CBS Inc. ("CBS") respectfully prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the Ninth Circuit denying CBS's petition for a writ of mandamus, entered on April 12, 1978.

OPINIONS BELOW

The decision sought to be reviewed in the Court of Appeals is the Final Judgment in *United States* v. *National Broadcasting Company, Inc.*, Civ. No. 74-3601-RJK (C. D. Cal.), an antitrust consent decree entered on November 28, 1977, pursuant to the Antitrust Procedures and Penalties

Act, 15 U.S.C. § 16(b)-(h) ("APPA"), by the United States District Court for the Central District of California (Kelleher, D.J.). That Final Judgment is reported at 1978-1 Trade Cas. ¶ 61,855, and is set forth in the separately bound Appendix to this petition at App. 20a.* The District Court's Memorandum of Decision Re Consent Decree, setting forth the grounds on which it had determined, as required under the APPA, that entry of the Final Judgment was "in the public interest", was entered on January 27, 1978. The Memorandum of Decision is reported at 449 F. Supp. 1127 and 1978-1 Trade Cas. ¶ 61,842, and is set forth in the Appendix hereto at 41a.

The Order of a two-judge panel of the United States Court of Appeals for the Ninth Circuit denying CBS's petition for mandamus was entered, without opinion, on April 12, 1978, and has not been reported. It is set forth in the Appendix at 7a.

On February 5, 1979, CBS's timely Petition for Rehearing and Rehearing In Banc was denied by unreported order of a two-judge panel of the Court of Appeals which is set forth in the Appendix at 8a.

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit denying CBS's petition for mandamus was entered on April 12, 1978. A timely petition for rehearing and rehearing in banc was denied on February 5, 1979, and this petition for certiorari was timely filed in accordance with 28 U.S.C. § 2101(c) and U.S. Sup. Ct. R. 22 and 34. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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* References to "App. " are to the separate Appendix to this petition submitted herewith.

QUESTIONS PRESENTED

The District Court, purportedly acting pursuant to the APPA, held that a consent decree in a government antitrust suit is "in the public interest", notwithstanding a showing by unrebutted expert affidavits and other submissions that the effect of the decree is (1) to restrain trade and suppress competition, (2) to establish a regulatory regime which overlaps and conflicts with the regulatory authority of the Federal Communications Commission, and (3) to impose prior restraints on a form of expression protected by the First Amendment. The Court justified its holding on the ground that the decree was consistent with the objectives of the Department of Justice in filing the complaint. The Court entered the decree in the face of unanimous industry opposition, without obtaining the views of any other government agency, without oral argument, and after denying petitioner's timely motions for intervention (under Fed. R. Civ. P. 24) and for an evidentiary hearing (under 15 U.S.C. § 16(f)).

Under such circumstances,

1. Did the District Court abdicate its responsibility under the APPA to make an independent judicial determination that the decree is "in the public interest", and not merely to rubber-stamp the position of the Department of Justice?

2. Did the Court of Appeals err in denying a petition for mandamus seeking review of the District Court's action, without requiring any response to the petition, and without giving any reason for such denial?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision and statutes involved in this case are the Constitution of the United States, Amendment I, the Sherman Act, 15 U.S.C. §§ 1, 2, and the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). The text of each is set forth in the Appendix at 1a-6a.

STATEMENT OF THE CASE

1. The Complaint.

The complaint in *United States* v. *NBC* (App. 9a) was filed in the United States District Court for the Central District of California on December 10, 1974. The complaint alleges that NBC has monopolized and unreasonably restrained "the trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours" in violation of Sections 1 and 2 of the Sherman Act. Virtually identical complaints making the same charges as to CBS and ABC were filed at the same time.* None of the complaints charges that NBC, CBS or ABC have agreed, conspired or colluded with each other in any way. The NBC complaint prays for injunctive relief, *inter alia,* restraining NBC from broadcasting entertainment programs produced by NBC and from bargaining for various rights with respect to programs obtained by NBC under licenses from independent producers.

2. The Proposed Decree and Accompanying Competitive Impact Statement.

On November 17, 1976, plaintiff and NBC filed a stipulation providing for the entry of a consent decree in the *NBC* action upon compliance with the provisions of the APPA. That proposed decree, with minor modifications, was entered by the District Court on November 28, 1977.* (App. 20a)

Consistent with the prayer of the complaint, the *NBC* decree restricts NBC from carrying on its network more than a limited amount of television entertainment programming produced by NBC (Section V(A)), prohibits NBC

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* *United States* v. *National Broadcasting Company, Inc.*, Civ. No. 74-3601-RJK (*"NBC"*); *United States* v. *CBS Inc.*, Civ. No. 74-3599-RJK (*"CBS"*); *United States* v. *American Broadcasting Companies, Inc.*, Civ. No. 74-3600-RJK (*"ABC"*). Predecessor complaints against each network, virtually identical to the present complaints, were filed in April 1972. Those complaints were dismissed without prejudice on November 13, 1974 (65 F.R.D. 415), because of the government's refusal to comply with discovery orders relating to defendants' defense that the actions had been commenced for the purpose of restraining and intimidating network news coverage and criticism of President Nixon and his administration. Such a prosecutorial purpose is impermissible under the First and Fifth Amendments and rendered the lawsuits constitutionally defective. *See, e.g., Blackledge* v. *Perry,* 417 U.S. 21 (1974); *Oyler* v. *Boles,* 368 U.S. 448 (1962); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *United States* v. *DeMarco,* 550 F.2d 1224 (9th Cir.), *cert. denied,* 434 U.S. 827 (1977); *United States* v. *Steele,* 461 F.2d 1148 (9th Cir. 1972). The allegations of that defense were supported by a substantial body of evidence that came to light during the Watergate and related investigations.

Defendants appealed the District Court's order insofar as it provided for dismissal *without* prejudice, but said appeal was dismissed by this Court for want of jurisdiction. *National Broadcasting Co.* v. *United States,* 421 U.S. 940 (1975). The present, virtually identical, complaints were filed within weeks after dismissal of the earlier actions.

* Certain of the provisions of the *NBC* decree do not come into effect unless "similar" relief is obtained by plaintiff against both CBS and ABC. Should the *CBS* or *ABC* action be dismissed or should "different" relief be had in either case, NBC is permitted to seek a modification of its decree so as not to be placed at a "competitive disadvantage" to CBS or ABC. (Competitive Impact Statement at 13, 14, 41 Fed. Reg. 52015, 52027-28 (1976))

from obtaining certain rights and interests in television entertainment programming it acquires from outside program suppliers (Sections IV(A); IV(B); VI) and regulates the conduct of negotiations and the terms of trade between NBC and its outside program suppliers (Section VI).

Plaintiff's Competitive Impact Statement, published with the proposed decree as required by 15 U.S.C. § 16(b), conclusorily asserted that the effect of the proposed decree will be to permit the "forces of competition ... to operate more freely on NBC's program procurement practices" (41 Fed. Reg. at 52021) and that the limitation on NBC's internal production would

> "enhance competition in television entertainment production and exhibition by eliminating the possibility that NBC could substantially increase its internal production of its network programs and thereby exclude independent program suppliers." (*Id.* at 52022)

Plaintiff also asserted in substance that, by enjoining NBC from acquiring various rights from its suppliers at any price, the decree would give those in "other fields" an opportunity to buy these rights without having to compete with NBC. (*Id.* at 52023)

Plaintiff did not offer any expert economic opinion or other evidentiary materials in support of its Competitive Impact Statement. Further, plaintiff represented that there were no materials or documents it considered determinative in formulating the proposed consent decree so that there was nothing it was required to disclose pursuant to 15 U.S.C. § 16(b).

3. Opposition to the Decree.

Following the filing of the proposed decree and Competitive Impact Statement in November 1976, an unprecedented barrage of critical comments was submitted to the Department of Justice, and subsequently transmitted to the court pursuant to the APPA (15 U.S.C. § 16(d)). Virtually all of those comments, submitted by some 70 corporations, associations and individuals, including representatives of virtually every aspect of the television industry and of many public interest groups, denounced the proposed judgment as "anticompetitive" or plaintiff's Competitive Impact Statement as "inaccurate" and "inadequate".*

CBS submitted comments in opposition to the proposed decree and moved to intervene in the action. CBS supported its comments and motion to intervene with affidavits of three professors of economics and a professor of law** showing that the proposed *NBC* decree would itself tend to suppress competition in the marketplace and would not be in the "public interest" as required by the APPA.

The economists concluded that the probable economic effect of restraining NBC's ability to broadcast programming produced by it and of otherwise restricting NBC's

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* The comments and the responses of the Department of Justice thereto were published, pursuant to the APPA, at 42 Fed. Reg. 24995-25312 (1977).

** Franklin M. Fisher, Professor of Economics at the Massachusetts Institute of Technology, William J. Baumol, Professor of Economics at Princeton University and New York University, Paul L. Joskow, Associate Professor of Economics at the Massachusetts Institute of Technology and Richard A. Posner, Professor of Law at the University of Chicago Law School. These affidavits are set forth in the Appendix at 82a, 109a, 112a and 98a, respectively.

ability to bargain for certain terms and conditions would be (i) to "restrict", "reduce" and "inhibit" competition among producers of television entertainment programming; (ii) to cause increased concentration among such producers; and (iii) to increase prices of the programs supplied to the networks. Professor Posner concluded that the consent decree was "anticompetitive", "inconsistent with the public interest as expressed by the Sherman Act" and, hence, "manifestly contrary to the statutory standard" of the APPA.

4. The District Court's Entry of the Decree Without Permitting Intervention or an Evidentiary Hearing.

On June 20, 1977, the District Court denied CBS's motion to intervene.* However, in its Memorandum of Decision and Order, the court said that the question of whether the proposed *NBC* decree would have an anticompetitive effect on the television industry involved "a major inquiry" which the court would pursue in its further consideration of the decree.

Seeking the "inquiry" promised by the District Court, CBS on November 7, 1977, filed a motion under 15 U.S.C. § 16(f) for an order setting an evidentiary hearing on the proposed decree and authorizing CBS as an "interested person" under 15 U.S.C. § 16(f) (3) to participate.**

Prior to the return date of CBS's motion for a hearing, the District Court signed and filed the proposed Final Judgment on November 23, 1977. Although the Judgment recites that its entry is "in the public interest" (App. 37a), the

* CBS's appeal from the denial of its motion to intervene was argued before a panel of the United States Court of Appeals for the Ninth Circuit on April 3, 1979, and is *sub judice*. See p. 24 *infra*.

** Motions seeking such a hearing were also made by ABC, certain motion picture companies and others.

District Court did not then offer any explanation of the basis for its "public interest" determination.

5. CBS's Petition for Mandamus.

On December 20, 1977, CBS filed a petition for a writ of mandamus pursuant to 28 U.S.C. § 1651 and Fed. R. App. P. 21 in the United States Court of Appeals for the Ninth Circuit. CBS's petition alleged that the District Court's determination that the decree is "in the public interest" constituted a clear error in the interpretation of a major new legislative enactment since it would operate to drive up prices paid to producers of television programming by restraining competition among them and therefore conflicts with the public policy declared by the Sherman Act. CBS pointed out that, as a major purchaser of television entertainment programming, it was directly affected by the decree's restraint on competition among program suppliers, that neither of the parties in *United States* v. *NBC* was in a position to appeal the court's decision, and that CBS had no means of obtaining appellate review other than mandamus.

CBS's petition further argued that the District Court's entry of the decree, notwithstanding the unrebutted showing of its anticompetitive nature, without invoking any of the procedural safeguards contemplated by 15 U.S.C. § 16(f), was a clear abuse of discretion in the circumstances of this case. Indeed, the District Court had failed even to set forth the basis for its "public interest" determination.

Finally, CBS urged that the *NBC* decree improperly subjects the industry to a major restrictive, regulatory scheme that conflicts with and overlaps the regulatory activities of the FCC, and imposes a prior restraint on speech impermissible under the First Amendment.

6. The District Court's Belated Explanation of Its "Public Interest" Finding.

On April 12, 1978, a two-judge panel of the Ninth Circuit denied CBS's mandamus petition and over two months after entry of the *NBC* decree, the District Court filed a "Memorandum of Decision Re Consent Decree" setting forth for the first time the basis for its determination that entry of the *NBC* decree was "in the public interest". (App. 41a)

The District Court appeared to accept CBS's analysis of the purpose and competitive effect of the *NBC* decree. The District Court found that the decree was designed to "even out the bargaining positions of NBC and its independent program suppliers", to enable NBC's program suppliers to "obtain more favorable terms than was heretofore possible" and, hence, to "improve the lot" of suppliers. (App. 60a-61a, 80a) And the court acknowledged that the decree does not achieve its purposes by enhancing or fostering competition among program buyers. (App. 80a) Instead, it does so by restraining NBC's actual and potential competition with program suppliers. The court nevertheless found that the *NBC* decree "advances and is consistent with" the apparent purpose of the Antitrust Division in filing the complaint and, hence, is in the public interest. (App. 61a, 77a, 80a)*

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* The District Court disposed of what it recognized as the "serious problem" of reconciling the *NBC* decree with the FCC regulatory role by concluding that "the burden would fall on the [Federal Communications] Commission to formulate regulations not in conflict with outstanding judicial orders". (App. 65a-66a)

The District Court brushed aside objections that the *NBC* decree conflicts with important First Amendment values, and hence was not in the public interest, by declaring CBS without "standing" to assert NBC's constitutional rights and by characterizing NBC's program production as a "commercial venture". (App. 67a)

7. The Court of Appeals' Denial of the Petition for Mandamus.

On February 21, 1978, CBS supplemented its petition for mandamus in light of the District Court's Memorandum, pointing out, *inter alia,* that improving the lot of competitors by restraining competition is inconsistent with the public interest as declared by the Sherman Act. *See, e.g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977); *Calnetics Corp.* v. *Volkswagen of America, Inc.,* 532 F.2d 674 (9th Cir.), *cert. denied,* 429 U.S. 940 (1976).

On April 12, 1978, a two-judge panel of the Ninth Circuit summarily denied CBS's petition without giving reasons or directing responsive papers from the parties. (App. 7a) CBS's timely petition for rehearing and rehearing in banc was similarly denied on February 5, 1979. (App. 8a)

REASONS FOR GRANTING THE WRIT

This case presents novel and important questions which should be settled by this Court, concerning the proper interpretation and application of the Antitrust Procedures and Penalties Act, and the method of review of district court determinations thereunder. The APPA is a new piece of remedial legislation designed to promote the procompetitive objectives of the antitrust laws and to end "judicial rubberstamping" of consent decrees in government antitrust actions.

The APPA reflects congressional recognition of the far-reaching economic impact of consent decrees in major government antitrust actions and congressional concern that the public interest—and most notably the public interest in a competitive economy—not be neglected in the disposition of such actions through essentially private negotiations

between the litigants. Accordingly, the APPA provides for publication of a proposed consent decree together with a detailed explanation by the Antitrust Division of its character and rationale in a Competitive Impact Statement (15 U.S.C. § 16(b)), grants interested persons an opportunity to comment on the proposed decree, and imposes upon the district courts the duty to make an independent, judicial determination that the proposed decree is in the public interest.*

In imposing this duty on the courts, Congress sought to strike a sound balance between requiring judicial proceedings so extensive as to discourage settlement altogether and leaving the process in the control of the settling parties subject only to the pro forma, rubber-stamp approval of the courts. In striking that balance, Congress provided a wide variety of techniques by which the courts, in the most efficient manner permitted by the circumstances, may adduce the information necessary to an independent, judicial determination, leaving the choice of means to the sound discretion of the court.**

The proper implementation of that balance has presented the district courts with difficult problems (*see, e.g., United States* v. *Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975)) as to which they have, because of the settlement posture of the cases involved, received virtually no guidance from the appellate courts and precious little from the parties. Yet it is apparent that, unless the APPA is to be deemed a congressional dead letter, the manner of its implementation cannot be left entirely to the wholly unreviewable discretion of the various district courts. In view of the difficulty in achieving the required balance (especially as

* *See generally* S. Rep. No. 298, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 1463, 93d Cong., 2d Sess. (1974).

** *See* 15 U.S.C. § 16(f), set out in the Appendix at 5a-6a; H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8-9 (1974).

regards highly complex, regulatory decrees), there must surely be limits beyond which a district court abuses its discretion and some appellate remedy must be found. Were, for example, a district court to approve a consent decree while expressly conceding that it was *not* in the public interest, the point would be obvious. Yet that, in substance, is what happened here. The decree was shown by unchallenged affidavits to be—and is on its face—an arrangement calculated to drive up the price of television programs by curtailing production. Had it been an agreement between purely private parties it would be clearly seen as a classic cartel arrangement. Yet the District Court approved the decree because it found it to be consistent with the purpose of the Antitrust Division in filing the complaint. Moreover, the court reached this conclusion—insufficient as a matter of law—without availing itself of *any* of the devices provided by Congress for obtaining the requisite information except those which were not in its power to avoid.

In sum, this case presents an appropriate vehicle for a delineation of the scope of the district courts' discretion under the APPA and the range of permissible meaning that may be attributed to the public interest standard thereunder.

1. The *NBC* Decree Is Designed To Suppress Competition and Drive Up Prices.

Congress made it evident that its primary "public interest" concern in enacting the APPA was the protection of "the public by insuring healthy competition in the future". S. Rep. No. 298, 93d Cong., 1st Sess. 6 (1973); H. R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). This decree most assuredly does not do so.

The decree places specific limits on NBC's production of programming. Such a restraint, except when of a

temporary nature and ancillary to a decree of divestiture (*e.g., Ford Motor Co.* v. *United States,* 405 U.S. 562, 575 n.10 (1972)), is unprecedented and inexplicable, except as a device to protect outside program suppliers from NBC's actual and potential competition and thus to increase their remuneration. In pursuit of its goal, the decree ignores the fundamental proposition that the antitrust laws "were enacted for 'the protection of *competition,* not *competitors', Brown Shoe Co.* v. *United States,* [370 U.S. 294, 320 (1962)]". *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977) (emphasis in original); *see Calnetics Corp.* v. *Volkswagen of America, Inc.,* 532 F.2d 674 (9th Cir.), *cert. denied,* 429 U.S. 940 (1976).

NBC's presence as a potential competitor, ready to expand in-house program production if prices rise above a competitive level, constitutes a substantial incentive to vigorous competition in program production. (Fisher Aff., App. 88a) The production limitations of Section V of the decree eliminate the substantial incentive to competition which NBC's potential production capacity represents.*

* Vertical and conglomerate acquisitions and mergers have been struck down precisely because they forestall potential independent entry by internal expansion which is "the sort of entry into a new market which Congress intended to encourage". *Bendix Corp.,* 77 F.T.C. 731, 825 (1970), *rev'd on other grounds,* 450 F.2d 534 (6th Cir. 1971); *see United States* v. *Philadelphia National Bank,* 374 U.S. 321, 370 (1963). The elimination of such potential independent entry has regularly been held likely substantially to lessen competition. *See, e.g., United States* v. *Falstaff Brewing Corp.,* 410 U.S. 526 (1973); *Ford Motor Co.* v. *United States,* 405 U.S. 562 (1972); *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158 (1964); *FTC* v. *Procter & Gamble Co.,* 386 U.S. 568 (1967); *United States* v. *Phillips Petroleum Co.,* 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd,* 418 U.S. 906 (1974). The Department would presumably have raised precisely this argument had NBC's elimination as a potential market entrant resulted from a merger with Warner Bros. or another program supplier.

As the District Court recognized, the decree does not attempt to improve the weal of suppliers by increasing the competition among buyers. The District Court repeatedly acknowledged that

> ". . . the judgment is *not* intended to enhance competition among the three television networks." (App. 64a, emphasis added; *see also id.* 61a, 80a)

Yet, in the absence of an increase in competition among the buyers, the only way the bargaining position of suppliers can be improved is by restraining competition among the suppliers. That, as CBS showed below, is precisely what the decree does.

To be sure, the District Court characterized the Antitrust Division's efforts to increase the market power of NBC's program suppliers, and thus "even out" the bargaining power of NBC and its suppliers, as "enhanc[ing] competition in the buying and selling of television programming". (App. 60a, 80a) But complex regulatory schemes such as that embodied in the decree, which are designed to displace the workings of the competitive system so as to "even out" supposedly uneven bargaining power and thus "improve the lot" of sellers at the expense of buyers or of some competitors at the expense of others, are not consistent with the procompetitive policy embodied in the Sherman Act. Congress has from time to time sought to restrain unfettered competition on the basis of a legislative determination that some disadvantaged group should receive more favorable treatment. The National Labor Relations Act, the National Industrial Recovery Act and the Agricultural Adjustment Act are conspicuous examples of that type of legislation. The Sherman Act, however, is not such a statute. As this Court instructed in *Northern Pac.*

Ry. v. *United States*, 356 U.S. 1, 4 (1958), ". . . the policy unequivocally laid down by the Act is competition."*

2. The District Court's View That a Decree Consistent with the Complaint and the Objectives of the Antitrust Division Ipso Facto Satisfies the Public Interest Standard of the APPA Is Erroneous.

Notwithstanding the anticompetitive effect of the restraints embodied in this decree, the District Court found the decree to be "consistent with" the theory of liability in the complaint and with the objectives of the Antitrust Division in the case and, so finding, determined that entry of the decree was in the "public interest".** (App. 61a, 77a, 80a) But approval of the decree on the ground of such consistency delegates to the Antitrust Division the very responsibility imposed on the courts by the APPA. A decree that seeks to enrich program producers by curtailing their competition cannot be found to be in the public interest simply because the Antitrust Division wants to achieve that

* *Cf. United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 611 (1972) (decisions "to sacrifice competition in one portion of the economy for greater competition in another" must be made by Congress, not by the courts); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 371 (1963) (anticompetitive merger not saved because deemed beneficial "on some ultimate reckoning of social or economic debits and credits").

** The only other factor to which the District Court alluded was the "additional confidence" it derived that the decree was in the "public interest" because objectors to the decree did not speak "with one voice"—some felt that the decree did "not go far enough" while others urged that the decree would "actually restrain otherwise healthy competition". (App. 77a) But a showing that this decree is inconsistent with policies and purposes of the Sherman Act cannot be balanced by claims that the decree does not go far enough in restricting competition. In all events, the unanimity with which every element of the "public" expressing its "interest" has denounced the decree is a most peculiar basis for "additional confidence" that the decree is "in the public interest".

result. Congress enacted the APPA precisely because it was concerned with the possibility of executive misfeasance and concluded that judicial review of antitrust consent decrees was required. *See* Note, *Construction and Modification of Antitrust Consent Decrees: New Approaches After the Antitrust Procedures and Penalties Act of 1974*, 77 COLUM. L. REV. 296, 307-08 (1977).

The APPA commands the district court, not the Antitrust Division, to "determine", as a condition precedent to the entry of an antitrust consent decree, that the decree is "in the public interest". Congress intended to mandate an "independent" judicial assessment to eliminate "judicial rubber stamping" of Antitrust Division consent decrees and to "impose a check" on the Antitrust Division's discretion. *United States* v. *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975); *see also* S. Rep. No. 298, 93d Cong., 1st Sess. 4-6 (1973); H. R. Rep. No. 1463, 93d Cong., 2d Sess. 8-9 (1974).*

* The government itself pointed out in hearings leading to adoption of the APPA that a district court's public interest inquiry is meant to "encompass not only whether the relief is adequate in view of that sought in the complaint, but whether the Government sought appropriate relief in the complaint itself". The Antitrust Procedures and Penalties Act: Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary. United States Senate, 93d Cong., 1st Sess. 93 (1973) (testimony of Hon. Thomas E. Kauper, Assistant Attorney General, Antitrust Division, United States Department of Justice); Consent Decree Bills: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 93d Cong., 1st Sess. 62 (1973) (testimony of Hon. Bruce B. Wilson, Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice).

Deference to the Department of Justice is particularly inappropriate in this case where NBC (and CBS and ABC) pleaded as a defense (which the District Court sustained on motion to strike) that this litigation was commenced as a result of the unconstitutional prosecutorial purpose of restraining, intimidating and inhibiting criticism of President Nixon and his administration.

United States v. *Gillette Co., supra,* the only decision applying the APPA cited by the District Court, stands in stark contrast to the procedures followed in the *NBC* case. In *Gillette,* a proposed consent decree was approved by Judge Aldrich only after repeated hearings and a number of judicially-inspired modifications designed to make the decree more procompetitive. As Judge Aldrich noted:

> "The legislative history [of the APPA] shows clearly that Congress did not intend the court's action to be merely pro forma, or to be limited to what appears on the surface. Nor can one overlook the circumstances under which the act was passed, indicating Congress' desire to impose a check not only on the government's expertise—or at the least, its exercise of it—but even on its good faith." 406 F. Supp. at 715.

3. The Refusal of the District Court To Permit the Adversary, Evidentiary Hearing Authorized by 15 U.S.C. § 16(f)(1) and (3) Was a Gross Abuse of Discretion in the Circumstances of this Case.

There is no basis on the current state of the record for a finding that the decree is "in the public interest", as required by the APPA. The only evidentiary material before the court was the unrebutted proof submitted by CBS that the decree was anticompetitive, and hence inconsistent with the public interest. As a result, unless the Final Judgment is to be rejected outright, as we believe it should be, the District Court must conduct further proceedings to determine whether there is any conceivable basis for entry of this Final Judgment.

One of the procedures explicitly authorized by the APPA in these circumstances is a hearing at which the district court shall "take testimony of Government officials or experts or such other expert witnesses . . . as the court may deem appropriate". (15 U.S.C. § 16(f)(1)) The APPA provides for "participation" by "interested persons" at such a hearing. (15 U.S.C. § 16(f)(3)) CBS moved the court below for such an adversary and evidentiary hearing, but the court entered the Final Judgment without ruling on CBS's motion and even before its return date.

While it was clearly not the intent of Congress in adopting the APPA to require a "hearing or trial on the public interest issue" in every case (S. Rep. No. 298, 93d Cong., 1st Sess. 6 (1973)), Congress did expressly authorize a district court to hold such a hearing where appropriate (15 U.S.C. § 16(f)). In the unprecedented circumstances of this case, a hearing was not only appropriate but imperative:

> (1) The decree and the Competitive Impact Statement were attacked by some 70 companies, associations and individuals, representing every element of the affected industry as well as public interest groups;
>
> (2) CBS made an evidentiary showing, *inter alia,* that the proposed decree would suppress competition and subvert the purposes of the antitrust laws; and
>
> (3) Neither plaintiff nor NBC offered any evidentiary support to justify entry of the decree.

The District Court itself acknowledged the need for "a major inquiry" into the potential anticompetitive effect on the television industry of this Final Judgment. (See p. 8 *supra.*) Such an "inquiry", if it is to be conducted, cannot be confined to the inner sanctum of judicial chambers. More is called for. Having recognized the need for "a major inquiry" the District Court should have accepted the offer of adversarial assistance. As Senator Edward M.

Kennedy, then Acting Chairman of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, noted with respect to the proposed Final Judgment:

> "It seems to me wholly inappropriate for a major policy decision of this potential impact to be decided without a complete record and in the context of a non-litigated consent decree with one network." 42 Fed. Reg. 25055 (1977).

The purpose of the APPA is to encourage and to facilitate participation in consent decree proceedings by "interested persons" who oppose entry of the decree, thus offering to the trial court the benefits of adversary proceedings which the parties, because of their consent to the entry of judgment, are simply not in a position to provide. *See United States* v. *Gillette, supra; cf. United States* v. *CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970). Effectuation of the purposes of the APPA requires an adversary proceeding of some type when substantial questions are raised concerning the "public interest" character of a proposed consent judgment. Indeed, it is an assumption of our entire judicial system, and the policy of the "case or controversy" requirement of Article III of the Constitution, that substantive "judicial" action is appropriate only upon the adversarial presentation of contested issues. *See United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961).

But in this case, the District Court completely ignored the discretionary fact-gathering and adversarial procedures provided by the APPA, such as intervention, references to masters, solicitation of federal agency views, appearances *amicus curiae*, evidentiary hearings, and limited or full participation by "interested persons". (15 U.S.C. § 16(f)) The District Court chose to shield itself from

any adversary presentation whatsoever. It did so in the face of a substantial evidentiary showing by CBS of the probable anticompetitive effects of the Final Judgment and in the teeth of unprecedented and unanimous condemnation of the Final Judgment by every segment of the affected industry. Yet, the language and the policies of the APPA, the "case or controversy" mandate of Article III of the Constitution, and common notions of due process, all require that there be a full ventilation of the pros and cons of a consent judgment and an informed, reasoned and articulated determination that entry of a consent judgment proposed by plaintiff is in the "public interest".

4. The Erroneous Standard Adopted by the District Court Substantially Prejudiced a Proper Assessment of the "Public Interest" as Declared in the Communications Act and the First Amendment.

At the very outset of this litigation the District Court recognized that accommodating equitable relief to the pervasive regulatory scheme of the FCC would present "a real and substantial problem" to which the court would have to attend in fashioning a decree.* Following the submission of the proposed decree, the court again noted the "serious" issue involved in reconciling the proposed decree with the ongoing regulatory activities of the FCC.** (App. 66a) Nevertheless, in entering the decree, without even soliciting the views of the FCC, the court gave short shrift

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* *United States* v. *National Broadcasting Co.*, 1974-1 Trade Cas. ¶ 74,885, at 95,992 (C.D. Cal. 1973).

** The District Court recognized (App. 65a) that many, if not all, of the provisions of the *NBC* decree—provisions characterized by the Antitrust Division as "regulatory" (Competitive Impact Statement at 9, 41 Fed. Reg. 52015, 52023 (1976))—are the subject of a pending inquiry by the FCC. *See In The Matter of Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest*, Notice of Inquiry, F.C.C. Docket No. 21049, 42 Fed. Reg. 4992 (1977).

to that "real and substantial problem" and abdicated responsibility for achieving the necessary accommodation, saying that "the burden would fall on the [Federal Communications] Commission to formulate regulations not in conflict with outstanding judicial orders". (App. 66a)

Even assuming, *arguendo,* that the District Court's decision to put "the burden" on the FCC to avoid judicial-regulatory conflict would be appropriate *if* the court were enforcing the procompetitive policy of the Sherman Act, it is radically unsound where, as here, the court has established a system of regulation designed not to eliminate restraints on competition but to "improve the lot" of program suppliers. That objective must find sanction, if at all, in considerations of public policy quite different from those underlying the antitrust laws. But, under the public policy declared by the Communications Act, 47 U.S.C. §§ 151 *et seq.*, the task of formulating and implementing such notions of the public welfare with respect to the broadcast industry has been allocated to the FCC.* Thus, the entry of the decree and the District Court's preemption of the FCC's regulatory jurisdiction cannot be found to be in the public interest insofar as that interest is delineated by the Communications Act.

CBS had also urged that the decree's proposed ban on NBC's internal production of programs conflicts with the fundamental policy of the First Amendment. The District Court summarily rejected that argument, principally on the ground that CBS did not have "standing" to assert NBC's constitutional rights.

But the *NBC* decree's imposition of a clear and explicit prior restraint on NBC's ability to produce entertainment programs cannot properly be brushed aside on "standing"

* 47 U.S.C. § 303.

grounds. CBS was not asserting NBC's constitutional rights. CBS was objecting, as it had a right to do under the APPA, that the decree constituted a prior restraint on freedom of speech and of the press, thoroughly obnoxious to a fundamental public policy declared in the First Amendment, and thus that its entry by a federal district court with powers limited by the Constitution was contrary to the "public interest".*

5. Mandamus Sought by Adversely Affected Nonparties Is the Only Effective Vehicle for Appellate Review of APPA Determinations.

Given the APPA's mandate for increased judicial scrutiny of antitrust consent decrees, it is essential that this Court fashion some means of appellate oversight of district court determinations under the APPA lest district courts be accorded, through default, an unintended nonreviewable discretion thereunder. *See Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964).

The original parties to an APPA consent decree will, of course, not seek appellate review of the propriety of its entry, no matter how egregious the error and notwithstanding the most blatant adverse effects on the public interest. *Cf. Swift & Co.* v. *United States,* 276 U.S. 311, 330 (1928). The proper enforcement of the antitrust laws would therefore be frustrated by a refusal to entertain nonparty efforts to obtain appellate review in appropriate cases.

* Nor is the "commercial" character of NBC's business (or even of the speech itself) determinative under the First Amendment. It is clear that the First Amendment protects even what had heretofore been regarded as purely commercial speech, and that this constitutional protection takes precedence over even highly esteemed policies thought to justify a restriction on its application. *See Bates* v. *State Bar,* 433 U.S. 350 (1977); *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748 (1976); *Bigelow* v. *Virginia,* 421 U.S. 809 (1975); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 266 (1964).

An adversely affected person, in the position of CBS here, should be permitted to pursue the remedy of mandamus to rectify manifest lower court failure to enforce the APPA.* The mandamus remedy has been afforded aggrieved nonparties in analogous circumstances. *See, e.g., United States* v. *Sherman,* 581 F.2d 1358 (9th Cir. 1978); *CBS Inc.* v. *Young,* 522 F.2d 234 (6th Cir. 1975).

Also, unlike the usual case, mandamus here does not involve "piecemeal litigation" that would undermine either the finality rule, 28 U.S.C. § 1291, or the carefully circumscribed congressional scheme governing interlocutory appeals, 28 U.S.C. § 1292. *See Will* v. *United States,* 389 U.S. 90, 96 (1967); *Kerr* v. *United States District Court,* 426 U.S. 394, 403 & n.6 (1976). Here we are dealing with a final judgment. Thus, the major policy consideration underlying the judicial hesitation to grant mandamus is not present in APPA consent decree cases.

Finally, CBS's petition for mandamus rests on considerations altogether different than those involved in its pending appeal from denial of its motion to intervene (see p. 8n.* *supra*). Irrespective of the scope and nature of the right to intervene as delineated by Fed. R. Civ. P. 24, the APPA expressly recognizes that nonintervening "interested persons" have a significant public interest role to play in proceedings at the district court level. Furthermore, district court actions calling for appellate

* We do not suggest that all interested persons are in a position to seek review by mandamus of all erroneous district court determinations under the APPA. Here, however, the purpose and effect of the decree is to restrain competition among program suppliers at the expense of program buyers. According to the Antitrust Division, CBS is one of only three such buyers. Hence, CBS is according to Government's own view one of a very few persons impacted by precisely those aspects of the *NBC* decree so clearly and indisputably contrary to the goals of the Sherman Act and of the APPA.

correction—such as the District Court's unexpected entry of the decree here without any hearing despite its previous undertaking to conduct a "major inquiry"—may come long after an intervention motion has already been denied, and too late in the proceedings for a new effort at intervention to be practicable. Since it is imperative that there be an appellate determination of the proper interpretation and application of the APPA and the public interest standard thereunder, the possibility of appellate scrutiny cannot properly be contingent upon the availability of intervention under Rule 24. The writ of mandamus, under these circumstances, affords a flexible and less intrusive means of providing the necessary guidance.

CONCLUSION

We respectfully submit that, in the absence of appellate scrutiny, the important purposes that Congress sought to serve in enacting the APPA can and, as the decision below shows, will be utterly frustrated.

For the reasons above stated, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Ninth Circuit denying CBS's petition for mandamus.

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